



REPUBLIC OF KENYA



KENYA LAW
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Kamau & 4 others v Kamau; Willow Park Limited (Judgment debtor) (Civil Appeal E097 of 2022) [2023] KEHC 2946 (KLR) (30 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E097 OF 2022
RB NGETICH, J
MARCH 30, 2023**

BETWEEN

**GEOFFREY MBUGUA KAMAU 1ST JUDGMENT DEBTOR
PETER MBIYU KOINANGE 2ND JUDGMENT DEBTOR
PATRICK KINYANJUI NJUGUNA 3RD JUDGMENT DEBTOR
NJOROGE O KIMANI 4TH JUDGMENT DEBTOR
MARY NJOKI KARUGA 5TH JUDGMENT DEBTOR**

AND

JOSEPH MAKUMI KAMAU DECREE HOLDER

AND

WILLOW PARK LIMITED JUDGMENT DEBTOR

RULING

1. Before this court for determination is the notice of motion application dated May 30, 2022 seeking the following orders: -
 - i. Spent
 - ii. That this honourable court be pleased to grant an interim order for stay of execution in the first instance as the Respondent will proceed to attach and /or sell Motor Vehicles Registration Numbers KCL 982T, KBB 092H, KAS 874Z which will render the appeal nugatory.
 - iii. That this honourable court is pleased to grant an interim order for a stay of execution in the first instance as the Respondent and /or his agents have already attached motor vehicle KBD 830B and KCL 928T and would proceed to sell them anytime.



- iv. That this honourable court be pleased to grant an order for stay of execution in the first instance as the motor vehicle registration numbers KCL 982T, KBB 092H, KAS 874Z and KBD 830B do not belong to the 7th Applicant or the Defendant Company.
 - v. That the Respondent and/or his agents Galaxy auctioneers be ordered to release the Motor Vehicle registration no KBD 830 B to the 2nd applicant for delivery to Ali Hassan Mohamed, the registered owner thereof.
 - vi. That the Respondent and /or his agents Galaxy auctioneers be ordered to release the Motor Vehicle KCL 982T to the 2nd applicant for delivery to Silverline Travel Ltd, the registered owner thereof.
 - vii. That interim orders of stay are granted for the purpose and substratum of the application dated May 16, 2022 and the appeal therein, so that they are not at loss nor overtaken by events.
 - viii. That costs be in the cause.
2. This application is premised on the grounds that the attached vehicles do not belong to the 7th Applicant or the Defendant Company; the applicants have paid a sum of kshs 2,000,000 towards the settlement and/ or refund of the amount of the deposit of the purchase price. That the Respondent attached and sold the Motor Vehicle KCJ k087Q through public Auction thus defeating the appeal; the applicants have an arguable appeal with merit; the Respondent failed to complete the transaction or pay the balance of the purchase price due; the applicants are willing to deposit in court as a deposit.
 3. The application is supported by the annexed affidavit of Peter Mbiyu Koinange who reiterates the grounds of the application. He deponds that the applicant has already paid a sum of kshs 2,200,000/= to the Respondent towards the settlement of the decretal sum of Kshs 3,238,590/=
 4. In opposing the application, the Decree holder filed a replying affidavit sworn on July 4, 2022, in which he deponds that the current application is a duplicate of the application dated May 16, 2022 which was filed after no orders were issued; that the decree subject to these proceedings was not *ex-parte* as the judgment debtor filed a defence and participated fully in the trial proceedings and the failure to call witnesses does not make the decree *ex-parte*. The applicants were represented by the firm of M/s Robson Harris & Co. Advocates; that this court lacks the jurisdiction to entertain the issues as depond in paragraphs 7-9 of the supporting affidavit as the issues were conclusively determined by the trial court on November 27, 2020.
 5. He further stated that the money in dispute relates to the sale of 1 unit and not the entire 144 units and therefore falls within the pecuniary jurisdiction of the court; and the averments in the current application can only be determined at the appeal stage and urged this court to dismiss the application.
 6. The application was heard through written submissions. I found only the Respondent's submissions in the file.

Respondent's Application

7. Counsel filed submissions on July 18, 2022 and submitted on three (3) issues. The first issue was whether the subordinate court had the jurisdiction to hear the decree-holder and where the appeal lies. Counsel submitted that at the time the suit was filed, the Magistrate court had the jurisdiction to determine land matters and submitted that dispute related to the sale and purchase of an apartment in Block B 2nd Floor and No 2C which was never constructed.



8. Counsel submitted that whereas the subordinate court has the jurisdiction over land matters, an appeal lies in the environment and land court and not the High Court. That the subordinate court had the jurisdiction to determine the matter in dispute while the High Court lacks the jurisdiction to determine the issue in question.
9. The second issue is whether a stay of execution should be granted under Order 42 Rule 6 of the Civil Procedure Rules where there is no appeal as against the decree. Counsel submitted that the current application seeks a stay of execution of the judgment but no appeal against the decree of November 27, 2021 or orders of November 24, 2021 and thus the orders sought cannot stand. The application for leave to appeal out of time is incompetent for failing to invoke the jurisdiction of the court.
10. Counsel urged the court to disallow the application which has been brought with delay and no explanation has been offered for the untimely delay. That the assertion that the applicants were not aware of the existence of the suit lacks basis as the applicant had made an undertaking to set off the decretal sum in Kiambu MCCC No. 117 of 2018 then standing at Kshs. 3,618,561/= by way of a piece of land.
11. Counsel submitted that the applicant has not met the threshold for granting a stay of execution order and urged the court to dismiss the application if the applicant has failed to demonstrate the substantial loss to be suffered if the orders are not granted, or whether the applicant appeal has high chances of success. That the security deposited in court is not sufficient to honour the decree as the applicants dragged the Respondent to court for failing to honour the contract and deliver the desired unit. Counsel urged the court to disallow the application.

Analysis And Determination

12. I have considered the averments herein and submissions filed. The issue for determination is whether the applicant has met the threshold for grant of stay of execution pending hearing and determination of appeal.
13. The principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides as follows: -
 1. No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 2. No order for a stay of execution shall be made under sub-rule (1) unless: -
 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
14. As per the above section, the applicant must demonstrate the existence of a substantial loss that will be suffered, that there is no delay in filing the application and that security is deposited.



15. The applicant contends that if stay orders are not granted, they stand to suffer irreparable loss as the Respondent will proceed to sell the attached Motor Vehicles belonging to 3rd Parties. The Applicant urges the court to issue an order that Motor Vehicles Registration no KBD 830B and KCL 982T be released to the original owners Ali Hassan Mohamed and Silverline Travel Ltd respectively.
16. On substantial loss, the court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
17. The power of the court to grant a stay of execution pending appeal is discretionary and must be exercised judicially.
18. Further, in the case of Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another vs. Agnes Naliaka Cheseto* the court held that: -

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”
19. On the issue of whether there is an unreasonable delay, the application was filed on May 30, 2022 and there is a previous application dated May 16, 2022 seeking similar orders while the decree seeking to be stayed is dated November 27, 2022. A Memorandum of Appeal was filed on May 17, 2022. In my view A period of five (5) months would not be an ordinate delay in the circumstance.
20. On the issue of security, the applicant has paid Kshs 2,200,000/= to the Respondent towards the settlement of the decretal sum of Kshs 3,238,590/= and is willing to deposit the balance of the decretal amount in court. The issue of security has therefore been settled.
21. On substantial loss, the applicant has stated that the vehicles attached belong to 3rd parties who will suffer if stay is not granted. In view of the fact that part of the decretal amount has been paid and the fact that the applicant is willing to deposit the balance of the decretal amount it would be unfair to occasion inconvenience to 3rd parties.
22. From the foregoing I find the applicant has met the threshold for granting a stay order.

Final Orders: -

1. I hereby stay of execution of the decree of the Kiambu MCCC No 117 of 2018 pending the appeal on condition that balance of decretal amount is deposited in court within 30 days from the date of this ruling.
2. Costs of this application to abide by the outcome of the appeal.

RULING delivered, dated and signed virtually at **Kabarnet**



This 30th day of March, 2023

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Mr. Makumi for Respondent

Mr. Ashford Muriuki for Appellant

